Supreme Court, U.S.
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No. - _____

In The___
Supreme Court Of The United States

MARTIN S. MCKAY,

Petitioner,

UNITED STATES OF AMERICA,

Intervenor,

v.

BROOK THOMPSON,
Individually and as
Coordinator of Elections,
State of Tennessee,

RILEY C. DARNELL,
Secretary of State,
State of Tennessee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the right to vote and the free exercise of religion constitute a hybrid right which is constitutionally protected, as per previous decisions of this court ?

2. When considering a motion for summary judgement and evaluating a claim of unconstitutional burdening of the right to vote pursuant to Section 1983 (42 U.S. § 1983) where such claim is for both injunctive relief and money damages, and where the Respondents (movant) have had the state legislature modify the statutory scheme during the course of litigation to seemingly render the question of injunctive relief moot; should the district court have deemed such modification as an admission by Respondent's that Petitioner's right to vote had been unlawfully and unconstitutionally denied without due process of law in light of the fact that Respondents never filed an answer to the complaint denying the allegations contained therein ?

3. When considering a motion for summary judgement and evaluating a claim of unconstitutional burdening of the right to vote pursuant to Section 1983 (42 U.S. § 1983) where such claim is for both injunctive relief and money damages, and where the Respondents (movant) have had the state legislature modify the statutory scheme during the course of litigation to seemingly render the question of injunctive relief moot, does Petitioner still have a valid claim for money damages to include recovery of costs, etc. ?

4. When considering a motion for summary judgement does a district court have jurisdiction even though it has failed to certify the matter to the Attorney General of the United States as required pursuant to 28 U.S.C. § 2403(a) because

the constitutionality of an act of Congress has been "drawn in question ?

5. When a circuit court of appeals has determined that a technical violation of 28 U.S.C. § 2403(a) has occurred, does it have discretionary authority not to remand the matter back to the district court ?

6. When considering a motion for summary judgement under rule 56(c) of the *Fed. R. Civ. P.* where Petitioner's attorney of record (nonmovant) did not respond, is such motion "properly supported" when the Respondent's (movant) have not filed an answer to the complaint denying the allegations contained therein ?

7. W hen considering a motion for summary judgement under rule 56(c) of the *Fed. R. Civ. P.* where Petitioner's attorney of record (nonmovant) did not respond, is less than four (4) months time considered "ample opportunity" for discovery when the Respondent's (movant) have not filed an answer to the complaint denying the allegations contained therein so that Petitioner would know what issues he needed to prove to meet the "affirmative burden" placed upon him ?

8. When considering a motion for summary judgement under rule 56(c) of the *Fed. R. Civ. P.* where the Petitioner's attorney of record (nonmovant) did not respond, does the district court have a duty to apply rules 8(d) and 12(a)(1)(A) of the *Fed. R. Civ. P.* when the Respondent's (movant) have not filed an answer to the complaint denying the allegations contained therein ?

9. Did the courts below err by finding that TENN. CODE ANN. § 2-2-116 meets the "grandfather exception" of Section 7(a)(2) of the Privacy Act of 1974 by "weighing the

evidence" and "determining the truth of the matter" at the summary judgement stage of litigation ?

10. When evaluating a claim pursuant to the Civil Rights Act of 1964 (42 U.S.C § 1971) where a private party is seeking to enforce a statutory right, is the statute enforceable by such private party through Section 1983 (42 U.S.C § 1983) or through the *Ex Parte Young* (209 U.S. 123 (1908)) exception to states' immunity ?

11. When evaluating a claim pursuant to Section 7 of the Privacy Act of 1974 (Public Law 93-579) where a private party is seeking to enforce a statutory right, is the statute enforceable by such private party through Section 1983 (42 U.S.C § 1983) or through the *Ex Parte Young* (209 U.S. 123 (1908) exception to states' immunity ?

12. Does Petitioner's attorney of records' failure to respond to the motion for summary judgement out weigh the error by the district court in determining that Section 7 of the Privacy Act of 1974 afforded no possibility of injunctive relief, as asserted by the Sixth Circuit Court of Appeals ?

13. Did the courts below err, by operation of law and/or general principles of statutory construction, because the Civil Rights Act of 1964 is "not submerged by a later enacted statute covering a more generalized spectrum" (*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)), in development of the analytical framework to determine whether Tennessee met the grandfather exception to Section 7 of the Privacy Act ?

14. Did the courts below err, by operation of law and/or general principles of statutory construction, because the Civil Rights Act of 1964 and the Privacy Act of 1974 are "not

submerged by a later enacted statute covering a more generalized spectrum" (*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)), in development of the analytical framework to determine what is prohibited by NVRA as "the minimum amount of information necessary" (42 U.S.C. § 1973gg-3(c)(2)(B)) in the case of registering to vote while obtaining a driver license, or, "such identifying information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant" (42 U.S.C. § 1973gg-7(b)(1)) in the case of registering to vote when utilizing a mail-in voter registration form ?

15. Did the courts below err by finding that Petitioner's right to vote is not unconstitutionally burdened by TENN. CODE ANN. § 2-2-127 and TENN. CODE ANN. § 2-2-138 by requiring public disclosure of SSN when these statutes are collectively applied to this fact situation ?

16. Has Petitioner's rights under the due process of law clauses and the privileges and immunities clauses been violated by the Respondent's in light of the fact that the courts below have erred on the questions presented herein ?

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.[1]

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[1] Additional parties appear on the caption to the opinion rendered by the U.S. Sixth Circuit Court Of Appeals. These parties were defendants before the District Court and were subsequently voluntarily dismissed. These parties were not appellees before the Sixth Circuit. These parties are: CAROLYN JACKSON, Administrator Of Elections, Hamilton County, Tennessee, and CLAUDE RAMSEY, County Executive, Hamilton County, Tennessee. Further, the Intervenor – UNITED STATES OF AMERICA was not a party to the proceeding before the District Court. The Intervenor was added to the proceeding before the Sixth Circuit upon certification to the Attorney General as per 28 U.S.C. 2403(a).

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Martin S. McKay respectfully petitions for a writ of certiorari to review the judgement of the United States Court Of Appeals For The Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported as *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (App. 3a). The judgement of the district court is unreported (App. 13a) and the opinion of the district court is unreported (App. 15a).

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgement on September 18, 2000 (App. 3a), and denied the Petition For Rehearing With Suggestion For *En Banc* Determination on October 27, 2000 (App. 1a). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Relevant statutory provisions are set forth in the Appendix at 42a – 46a.

Federal statutory provisions are *Intervention By United States* (28 U.S.C. § 2403(a)), the *Civil Rights Act of 1964* (42 U.S.C. § 1971(a)(2)(B)), the *Privacy Act of 1974, Section 7* (P.L. 93-579 § 7), and the *National Voter Registration Act of 1993* (42 U.S.C. § 1973gg), sub-sections 3(c)(2)(B) and 7(b)(1), and 42 U.S.C. § 1983.

Tennessee statutory provisions are *Qualified Voter* (TENN. CODE ANN. § 2-2-102), *Registration Form* (TENN. CODE ANN. § 2-2-116), *Permanent Registration Records Open To Inspection* (TENN. CODE ANN. § 2-2-127), *Voter*

Registration Lists – Purchase By Citizens (TENN. CODE ANN. § 2-2-138)

Further, certain provisions of the U.S. Constitution are also at issue in this matter. They are, the *Due Process* clauses of the *Fifth* and *Fourteenth* Amendments, the *Privileges And Immunities* clauses of *Article 4 § 2* and the *Fourteenth* Amendment, the *Free Exercise Of Religion* clause of the *First* Amendment, as well as Petitioner's claim that his right to vote was unconstitutionally burdened.

STATEMENT OF THE CASE

On October 14, 1998, Petitioner filed suit in district court in an effort to compel the Respondents to register him to vote without providing his Social Security Number ("SSN"). This action was commenced after repeated attempts in the Summer and Fall, 1998, to work through this issue with the administrative component of the Tennessee election apparatus (for a complete chronology of events, see App. 17a-20a). On October 29 and 30, 1998 the district court held a hearing for preliminary injunction, subsequently denying plaintiff's motion on November 2, 1998.

After the preliminary injunction hearing Petitioner's attorney of record apparently did not follow through on several issues including responding to the Respondent's motion for summary judgement. On October 29, 1999, the district court entered an order granting summary judgement in favor of Respondent's. At this point, Petitioner personally assumed responsibility for prosecution of the matter and timely filed a Notice of Appeal on November 19, 1999.

On September 18, 2000, the U.S. Sixth Circuit Court of Appeals rendered a decision in the matter unfavorable to

Petitioner (App. 3a), although finding that there were certain errors embodied within the case (App. 11a). On October 27, 2000, the Sixth Circuit denied Petitioner's request for rehearing (App. 1a).

A. Proceedings In The District Court

As already stated, Petitioner's attorney of record erred in his failure to follow through on several issues pertinent to this matter. First among these was his failure to file an amended complaint after the district court granted leave to do so (App. 40a). Second, he failed to file a motion for default judgement after being put on notice by the district court that the Respondent's had not yet filed an answer to the complaint (App. 41a). Third, he failed to adequately prosecute the matter after the scheduling conference on February 19, 1999 by making no effort to conduct discovery as required by *Fed. R. Civ. P.*, although there is arguably a valid reason (see discussion under item two on pp. 7-8 herein). Fourth, he failed to respond to the motion for summary judgement filed by the Respondent's.

Additionally, the Respondent's did not file an answer to the complaint. Even when they were put on notice by the district court that they needed to answer the complaint, they failed to do so. Further, the district court failed to certify the matter to the Attorney General as required pursuant to 28 U.S.C. 2403(a).

B. Proceedings In The Sixth Circuit Court Of Appeals

After the briefing process had been concluded before the Sixth Circuit the United States intervened as of right pursuant to 28 U.S.C. § 2403(a) by order of the Court entered on July 20, 2000.

On September 18, 2000, the Sixth Circuit rendered a decision unfavorable to Petitioner while acknowledging that the district court had erred on at least two (2) material issues in its disposition of the case (App. 10a-11a). First, is whether a district court has jurisdiction to consider a motion for summary judgement when it has failed to certify the matter to the Attorney General of the United States as required by 28 U.S.C. 2403(a) (App. 42a). Second, is whether the Petitioner's attorney of record's failure to respond to the motion for summary judgement out weighs the error by the district court in determining that Petitioner could have no injunctive relief pursuant to the Privacy Act of 1974, Section 7 (App. 43a).

Additionally, Petitioner believes that the Sixth Circuit erred in its disposition of the case because they declined to entertain material questions of fact (App. 7a), which they believe were raised inappropriately for the first time in Petitioner's reply brief. However, the position of the Sixth Circuit in this regard is erroneous. In their response brief the Respondent's asserted that the district court had "correctly determined" that the State Defendant's fell within the statutory exception to Section 7 of the Privacy Act. Petitioner simply pointed out in his reply brief to the Sixth Circuit that the Respondent's had not filed an answer to the original complaint, therefore, the district court could not have "correctly determined" anything in its consideration of the motion for summary judgement because it failed to apply rules 8(d) and 12(a)(1)(A) of the *Fed. R. Civ. P.* which require that the allegations contained within the complaint are to be "deemed admitted" if they are not denied.

REASONS FOR GRANTING THE WRIT

In light of the fact that the right to vote is the most fundamental and basic right which we enjoy as American citizens today, passed down to us by our forebears, it is no small matter when that right is denied by a State for the declination of a citizen to provide his SSN. Particularly, when such disclosure specifically violates numerous federal statutory and constitutional provisions designed to protect that right. Made all the more alarming by the fact that the Respondents simply do not care that they are in violation of numerous federal statutes.

Further, in light of the recent U.S. Presidential election dispute in Florida, *Bush v. Gore*, 531 U.S. ___ (Slip Op. 2000), it becomes abundantly clear that every vote does count and when that right is denied it should be for the utmost reasons of strict scrutiny, which the Respondents and the courts below have failed to understand and recognize. For the reasons stated herein, Petitioner believes that the questions presented are of paramount national and public importance in light of the debacle which the nation and the State of Florida experienced most recently.

I.

THE DECISION OF THE SIXTH CIRCUIT REGARDING JURISDICTION OF THE DISTRICT COURT WHEN IT FAILED TO CERTIFY THE MATTER TO THE ATTORNEY GENERAL IS ERRONEOUS.

The finding by the Sixth Circuit that a technical violation of the requirement to certify the matter to the U.S. Attorney General as per 28 U.S.C. § 2403(a) (App. 42a) did occur but declining to hold that the district court was without jurisdiction (App. 11a, relying on *Wallach v. Lieberman*, 366 F.2d 254 (2nd Cir. 1966)) is erroneous. The language of the

statute is clear, concise and unambiguous, "the court shall certify such fact to the Attorney General". The word "shall" in this context means that the court has a duty to certify the matter, it is not open to interpretation and/or discretion as both the district court and the Sixth Circuit seem to believe. Petitioner submits that the district court was without jurisdiction to consider the motion for summary judgement because it failed in its duty regarding this issue. As such, on finding the existence of a technical violation the Sixth Circuit should have remanded the matter back to the district court.

The Constitution and constitutional laws of the United States are the supreme law of the land. U.S. CONST., art. 6, § 2. When a decision by a court is in conflict with such law then its decision is *ultra vires*, void, of no effect. As a result of its unconstitutional arrogation of power the U.S. Sixth Circuit's decision is a nullity. The language of the statute, being neither vague nor ambiguous, requires that the judgement of the district court be vacated and remanded for proper proceedings.

Petitioner is unable to locate a citation where this court has considered this statute in this particular context. As this issue is material to determining Petitioner's claims regarding his most basic right to vote, this court should grant certiorari on questions four (4) and five (5) of this petition.

II.

THE DECISIONS OF THE COURTS BELOW REGARDING APPROPRIATE CRITERIA WHEN CONSIDERING A MOTION FOR SUMMARY JUDGEMENT UNDER RULE 56(c) ARE ERRONEOUS.

The courts below have held that the motion for summary judgement filed by the Respondents was "properly supported".[2] The district court further held that "courts do not have a responsibility to search *sua sponte* the record for genuine issues of material fact" (App. 17a). Also, this court has indicated that "we assume that both parties have had ample opportunity for discovery". *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,250 n5 (1986).

Petitioner agrees with the district court's observation that it does not have a responsibility to "search *sua sponte* the record", however, the court does have a responsibility to determine if "genuine issues of material fact" exist. Rule 7(a) of the *Fed. R. Civ. P.* states that "There shall be a complaint and an answer...". At a minimum, when determining whether there is a genuine issue of material fact, the district court has a responsibility to at least refer to the answer filed in response to the complaint in an effort to determine whether any admissions or denials are present and/or contained within the record. To rely solely upon the memorandum of law which was filed by the Respondents in support of the motion for summary judgement, is tantamount to accepting the equivalent of "allegations" without having an obligation to

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[2] The district court stated that "Defendants filed a brief in support of their motion" (App. 16a) and held that the nonmovant "must come forward with some significant probative evidence to support its claim" (App. 16a-17a). The Sixth Circuit held that "when McKay failed to respond to the motion for summary judgement, he defaulted on his duty to produce affirmative evidence" (App. 7a). Further, this court has held that "when a properly supported motion for summary judgement is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial" (footnotes and internal quotations omitted). *See Anderson v. Liberty Lobby, Inc*, 477 U.S. 242,250 (1986).

meet its burden of showing that there is "no genuine issue of material fact". *See Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986) (discussing movant's burden in making a summary judgement motion). Petitioner submits that the motion for summary judgement was not "properly supported" considering the absence of an answer to the complaint.

Petitioner notes that the scheduling conference was conducted on February 19, 1999 (App. 37a). Per the scheduling order entered on February 26, 1999 (App. 37a) the discovery planning meeting took place on March 18, 1999 and set the completion date for all discovery at July 12, 1999. Thus, leaving less than four (4) months available to conduct all discovery, including the taking of depositions by expert witnesses if necessary. Petitioner submits that there was not sufficient time to adequately conduct discovery in less than four months (*see Anderson* at 250 n5) when Petitioner had no way of knowing which items were in dispute, this because the Respondents did not file an answer to the complaint. How could Petitioner have been sure what items he needed to prove through the discovery process in order to determine which items were "genuine issues of material fact" for purposes of the summary judgement motion in order to meet his "duty to produce affirmative evidence" (App. 7a) ?

Further, in the absence of an answer to the complaint, the courts below failed to apply rules 8(d) and 12(a)(1)(A) in consideration of the motion for summary judgement. These rules collectively stipulate that if an answer is not filed within twenty (20) days then the averments contained in the complaint are "admitted". Also, the Respondent's were put on notice by the district court that they needed to file an answer to the complaint (App. 40a). However, even with this reminder, the Respondent's failed to answer the complaint. The federal courts have recognized that where the complaint

has not been answered the facts and averments contained in the complaint are presumed to be true when considering a motion for summary judgement.[3] Petitioner discussed above that this particular issue was the item which the Sixth Circuit "declined to entertain" because it was "raised for the first time in McKay's reply brief" (App. 7a). The response brief before the Sixth Circuit by the Respondent's asserted that the district court had "correctly determined" that the State Defendant's fell within the statutory exception to Section 7 of the Privacy Act. Petitioner simply pointed out in his reply brief to the Sixth Circuit that the Respondent's had not filed an answer to the original complaint, therefore, the district court could not have "correctly determined" anything in its consideration of the motion for summary judgement because it failed to apply rules 8(d) and 12(a)(1)(A) of the *Fed. R. Civ. P.*

The district court held that TENN. CODE ANN. § 2-2-116 "falls within the section 7(a)(2) exception for a system of records [requiring the disclosure of one's SSN] in existence and operating before January 1, 1975 ..." (App. 25a). The Sixth Circuit affirmed this finding (App. 7a). The holding of the courts below is in sharp contrast to the stated purpose of a summary judgement motion and the district court's function and associated responsibility therein. The judge's function in the district court "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial" (*see Anderson* at 249). As such, it becomes clear that the court's below have erred in

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[3] In the case of *Creedon v. Bowman*, 75 F.Supp. 265 (1948), the court cites dicta from *Williams v. Walnut Park Plaza, Inc.*, 68 F.Supp. 957 (1946), which recognizes this construction. "Since no answer has been filed ... all facts well pleaded in the complaint must be presumed to be true." *See Creedon* at 267 and *Williams* at 959.

this finding. Even if the district court were to hold that there was "no genuine issue of material fact", it simply should have been left at that. However, the court went on to declare that Tennessee met the grandfather exception to Section 7(a)(2). Petitioner submits that the district court exceeded the scope and function of its authority by doing such at the summary judgement stage of litigation.

Assuming arguendo, that a district court were to find "no genuine issue of material fact" it should then only grant summary judgement, not proceed to make a "declaratory judgement" as to the "truthfulness" of the assertion by the Respondent's that they meet the grandfather exception. In such a scenario, the district court would have acted within the scope of its authority at this stage of the litigation. However, by acting as though it were "weighing the evidence" and "determining the truth of the matter", the district court erred by declaring that Tennessee met the grandfather exception. In effect, the district court was acting as though it were a "fact finder at trial" at an inappropriate stage of the litigation. Petitioner submits that even if this court should hold that he should not prevail on his Privacy Act claim, this court should still reverse the finding of the courts below that Tennessee meets the grandfather exception because such finding is a result of the courts below having exceeded their authority at the summary judgement stage of litigation.

Petitioner is unable to locate a citation where this court or the several Courts of Appeals have considered these particular issues – 1.) whether a summary judgement motion is "properly supported" in the absence of an answer to the complaint, 2.) whether less than four months is "ample opportunity" to conduct discovery in the absence of an answer to the complaint, 3.) whether rules 8(d) and 12(a)(1)(A) should be applied in consideration of a motion

for summary judgement in the absence of an answer to the complaint (or other responsive pleading), and 4.) whether the district court exceeded the scope and function of its authority by making a declaratory statement (i.e.-"judgement") that Tennessee met the grandfather exception to Section 7(a)(2) of the Privacy Act. As these issues are material in determining Petitioner's claims regarding his most basic right to vote, this court should grant certiorari on questions six (6), seven (7), eight (8), and nine (9) of this petition.

III.

THE DECISIONS OF THE COURTS BELOW REGARDING ENFORCEMENT OF THE CIVIL RIGHTS ACT OF 1964 CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have held that Petitioner lacks standing to enforce a provision of the Civil Rights Act of 1964 (42 U.S.C. § 1971(a)(2)(B)) because this provision is enforceable by the Attorney General (42 U.S.C. § 1971(c)) (see statute at App. 42a-43a). *See App. 8a for the Sixth Circuit holding and App. 27a-28a for the district court holding on this issue.*

In holding that Petitioner cannot enforce this provision of the Civil Rights Act the courts below are in direct conflict with previous decisions of this court. In *Blessing v. Freestone*, 520 U.S. 329, 338 (1997), this court held that where there is an enforceable statutory right with no provision for private remedy, such a right may be enforced by private actors through section 1983 (42 U.S.C. § 1983), citing *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990). Also, in *Wilder* this court further held that,

"only when the statute itself creates a remedial

> scheme that is sufficiently comprehensive ... to demonstrate congressional intent to preclude section 1983 actions, is such an action foreclosed." [internal quotations omitted] *See Wilder* at 521.

Additionally, in *Blessing* this court held that where a statute "contains no private remedy – either judicial or administrative – through which aggrieved persons can seek redress", relief is available through section 1983. *See Blessing* at 348.

Section 1971 of the Civil Rights Act contains no provision or remedial scheme for private enforcement, through either judicial or administrative avenues. Neither the courts below (App. 27a), nor do the Respondents, deny that there is an enforceable statutory right, they simply hold that Petitioner lacks standing to enforce this right. The district court even ackowledged that "McKay makes a persuasive argument that his SSN is not material to determining his qualification for voting; and therefore, his omission of that information cannot be grounds for refusing his registration" (App. 27a). Petitioner submits that this provision of the Civil Rights Act of 1964 is enforceable through section 1983 as per previous decisions of this court.[4]

However, even if this court should determine that section 1971 is not enforceble through section 1983, there are other avenues through which section 1971 can be enforced. Specifically, this court has long held that "the Constitution and constitutional laws of the [United States are] the supreme

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[4] Contrary to the assertion of the Sixth Circuit in footnote 5 of its opinion (App. 11a-12a), Petitioner has never argued that the Civil Rights Act violation should have been certified to the Attorney General because its constitutionality had been "drawn in question". Petitioner simply argued for enforcebility through section 1983.

law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation." *See Ex Parte Siebold*, 100 U.S. 371, 399 (1879); *see also Millken v. Bradley*, 418 U.S. 717, 744 (1974). "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity." *See Siebold* at 392.

Appropriately, this court has held that there is an exception to states' immunity from suit for just such a situation. In *Ex Parte Young*, 209 U.S. 123 (1908), this court held that a "state official" may be enjoined from violating federal law. The concept of the *Ex Parte Young* exception is that a suit against a state officer is not a suit against the state when the remedy sought is an injunction against an illegal action, for an officer is not acting on behalf of the state when he acts illegally. Therefore, a state officer is effectively stripped of his character as an agent of the state when he acts illegally, thus, allowing an action to ensue.

Regardless of which enforcement mechanism this court determines is applicable to section 1971, either section 1983 or the *Ex Parte Young* exception, it is clear that the Respondent's are in violation of the Civil Rights Act of 1964. They do not deny this fact.

Petitioner is unable to locate a citation where this court or the several Courts of Appeals have considered this statute (other than the instant matter by the Sixth Circuit). As this issue is material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on question ten (10) of this petition.

IV.

THE DECISIONS OF THE COURTS BELOW REGARDING ENFORCEMENT OF SECTION 7 OF THE PRIVACY ACT OF 1974 CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have adopted different perspectives on the enforceability of Section 7 of the Privacy Act of 1974. The district court held that the Eleventh Amendment "precludes an action by McKay against Defendants in their official capacities" (App. 27a). The Sixth Circuit held that the district court "erred in adopting the defendant Tennessee officials' position that the Eleventh Amendment immunity barred McKay from gaining any relief for his claims under federal law because prospective injunctive relief was possible for him in theory". (App. 11a, citing *Lawson v. Shelby County, Tenn.*, 211 F.3d 331, 335 (6th Cir. 2000)). The Sixth Circuit in *Lawson*, which was decided after the briefing process was concluded in the instant matter, determined that prospective injunctive relief is permitted under the *Ex Parte Young* exception to states' immunity, as well as declaratory relief and costs because they are ancillary to prospective injunctive relief. *See Lawson* at 335.

Both Petitioner and Intervenor presented argument before the Sixth Circuit that section 1983 relief was available to enforce Section 7 of the Privacy Act. This because, in the words of the Intervenor, "where, as here, a statute by its terms applies to state actors, creates enforceable rights and contains no remedies to enforce such rights, § 1983 relief should be available."[5] Further, for the same reasons that

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[5] Brief of Intervenor before the Sixth Circuit on appeal, p. 12. Intervenor's brief is not in the Appendix to this petition.

Petitioner presented above regarding the Civil Rights Act claim, when citing both *Blessing* and *Wilder*, Section 7 of the Privacy Act "contains no private remedy – either judicial or administrative – through which aggrieved persons can seek redress" (*see Blessing* at 348) and therefore such a right may be enforced by private actors through section 1983 (*see Wilder* at 509).

In the instant matter the Sixth Circuit adopted the precedent from *Lawson* that the *Ex Parte Young* exception to states' immunity should apply to Section 7 of the Privacy Act. However, since Petitioner's attorney of record did not respond to the motion for summary judgement, Petitioner had "defaulted on his duty to produce affirmative evidence" (App. 7a). Apparently, the Sixth Circuit has held that this "default" out weighs the technical error made by the district court in determining whether prospective injunctive relief was available through Section 7 of the Privacy Act because "the district court's error does not affect the outcome of this case" (App. 11a).

Also, as the Intervenor pointed out before the Sixth Circuit,[6] the district court explained that it must "ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power" (App. 26a). The district court did not reach the second question. Because it held that the Privacy Act did not abrogate state immunity it determined that the Respondent's were immune from suit. Petitioner submits that when a district court has erred (as in this illustration), even considering that a response to the motion for summary judgement was not filed, the standard of a "duty to produce

[6] Brief of Intervenor, p. 4 (not in Appendix to petition).

affirmative evidence" should be subordinate to the Sixth Circuit finding of technical error by the district court.

The courts below have erred in development of the analytical framework concerning statutory construction of Section 7 of the Privacy Act. However, neither court considered the fact that "a specific statute will not be controlled or nullfied by a general one, regardless of the priority of enactment". *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), citing *Morton v. Mancari*, 417 U.S. 535, 550-551. Therefore, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum". *See Radzanower* at 153. Further, "when two statutes are capable of co-existence, it is the duty of courts ... to regard each as effective". *See Radzanower* at 155. By ignoring the Civil Rights Act prohibition of requiring SSN in development of the statutory construction of Section 7 of the Privacy Act, the courts below have erred. Just because the courts below have determined that Petitioner cannot enforce the Civil Rights Act the statute should not be taken as being "incapable of co-existence" with the Privacy Act because it is not "nullified ... regardless of the priority of enactment".

Petitioner is unable to locate a citation where this court has considered Section 7 of the Privacy Act of 1974. Petitioner notes that the Ninth Circuit has adopted the position that Section 7 of the Privacy Act does not apply to state actors. *See Dittman v. California*, 191 F.3d 1020, 1028-29 (9th Cir. 1999); relying on and citing *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983). As these issues are material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on questions eleven (11), twelve (12), and thirteen (13) of this petition.

V.

THE DECISIONS OF THE COURTS BELOW REGARDING APPLICABILITY AND STATUTORY CONSTRUCTION OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ARE ERRONEOUS AND ALSO CONFLICT WITH PREVIOUS DECISIONS OF THE FOURTH CIRCUIT.

The courts below have held that the National Voter Registration Act of 1993 ("NVRA") does not prohibit the Respondent's from requiring SSN as a pre-requisite to registering to vote.

The district court concluded that "a SSN falls within the minimum amount of information necessary to, ... enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process" (App. 24a). The court held in this manner because it reasoned that the Respondent's needed the SSN to "administer voter registration and other parts of the election process" (App. 23a), and therefore, was not more than the "minimum amount of information necessary".

The Sixth Circuit held that "The NVRA does not specifically forbid use of social security numbers" (App. 8a). The court reasoned that since NVRA is more general than the Privacy Act of 1974 about what information may be required, then it logically followed that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum", (App. 8a), citing *Radzanower* at 153.

In development of the analytical framework for statutory construction of NVRA as it relates to registering to

vote while obtaining a driver license (42 U.S.C. § 1973gg-3(c)(2)(B)) (App. 44a), and while registering to vote utilizing a mail-in voter registration form (42 U.S.C. § 1973gg-7(b)(1)) (App. 44a), the courts below have erred. The district court's holding applies to registering while obtaining a Tennessee driver license. The Sixth Circuit's holding applies to that situation as well as while registering to vote while utilizing a mail-in voter registration form. Petitioner's complaint addressed 42 U.S.C. § 1973gg-3(c)(2)(B) and during the hearing for preliminary injunction the parties made a stipulation (App. 47a) that the mail-in registration form was used, therefore, 42 U.S.C. § 1973gg-7(b)(1) is under consideration as well.

The district court determined that Petitioner could not enforce either the Civil Rights Act or the Privacy Act, therefore, NVRA was to "stand on its own", so to speak. The Sixth Circuit determined that Petitioner could not enforce the Civil Rights Act but could enforce the Privacy Act, therefore, NVRA's statutory construction was based on the finding that the Respondent's met the grandfather exception of requiring SSN pursuant to Section 7(a)(2).

The reasoning of both courts is flawed. Neither court considered the fact that "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment". *See Radzanower* at 153. Further, "when two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective". *See Radzanower* at 155. By ignoring the Civil Rights Act prohibition of requiring SSN in development of the statutory construction of NVRA, the courts below have erred. Just because the courts below have determined that Petitioner cannot enforce the Civil Rights Act it should not be taken as

being "incapable of co-existence" with NVRA because it is not "nullified ... regardless of the priority of enactment".

As such, when the courts below were constructing the statutory framework of what is "the minimum amount of information" and what is allowed under "administration of other parts of the election process" , etc., they should have utilized the provision from the Civil Rights Act of 1964 to make this determination. Petitioner submits that when this court considers the correct analytical framework for development of the statutory construction relative to these two (2) provisions of NVRA, it will reach a much different conclusion and determine that NVRA does prohibit requiring disclosure of SSN as a pre-requisite to registering to vote.

Petitioner is unable to locate a citation where this court or any of the several Courts of Appeals have considered these statutory provisions (other than the instant matter by the Sixth Circuit). As these issues are material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on question fourteen (14) of this petition.

VI.

THE DECISIONS OF THE COURTS BELOW REGARDING THE UNCONSTITUTIONAL BURDENING OF PETITIONER'S RIGHT TO VOTE ARE ERRONEOUS AND CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT AS WELL AS THE FOURTH CIRCUIT.

The courts below have erred by holding that Petitioner's right to vote has not been unconstitutionally burdened (Sixth Circuit - App. 9a, district court – 29a-31a). The Sixth Circuit simply said "we reject McKay's first claim

that his fundamental right to vote was unconstitutionally burdened by the social security number requirement" (App. 9a). The court cites *Greidinger v. Davis*, 988 F.2d 1344, 1352-54 & n. 10 (4th Cir. 1993). In *Greidinger* the Fourth Circuit held that the right to vote was unconstitutionally burdened because Virginia routinely disclosed SSN to citizens and organizations that purchased lists of registered voters. In the instant matter, TENN. CODE ANN. § 2-2-127 (App. 45a) provided for the same disclosure of SSN as did Virginia at the time this suit was filed. On April 12, 1999, Tennessee modified the statute to redact SSN from a subset of voter registration lists, those that are stored on a computer as of that date (App. 45a-46a).

The Sixth Circuit did not explain why they rejected Petitioner's claim. Even if Petitioner's right is not now unconstitutionally burdened, his right to vote in 1998 was burdened. Therefore, the Sixth Circuit should have at least remanded the matter for determination of damages. Also, in light of the fact that Respondent's modified the statutory scheme during the course of the litigation and never filed an answer to the complaint, Petitioner submits that the courts below should have deemed such action as an admission by Respondent's that they had indeed unconstitutionally burdened Petitioner's right to vote in 1998 when considering the motion for summary judgement.

Further, a close reading of the revision to TENN. CODE ANN. § 2-2-127 yields the conclusion that there is still an unconstitutional burdening of Petitioner's right to vote. The revised statute states in pertinent part, as follows,

> "a registrar shall make a reasonable effort to redact a person's social security number from a record before such record is made available to any person other

> than the holder of the number if such record is stored in computer readable format on April 12, 1999." (App. 46a)

The Respondent's conveniently did not address how a registrar should handle SSN for records which were not stored on a computer before April 12, 1999 and those that would be stored on a computer after April 12, 1999. Do the Respondent's have a record of exactly which records were stored on a computer on that specific date ? Likely, they do not. Further, TENN. CODE ANN. § 2-2-138 (App. 46a) places a duty on each county in Tennessee with a population greater than 180,000 persons to publish a listing of registered voters.

Petitioner is unable to locate a citation where this court has considered this specific set of circumstances within the context of the right to vote. As these issues are material in determining Petitioner's claims regarding his most fundamental right to vote, this court should grant certiorari on questions two (2), three (3), and fifteen (15) of this petition.

VII.

THE DECISIONS OF THE COURTS BELOW REGARDING PETITIONER'S HYBRID RIGHT CLAIM ARE IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have held that Petitioner's hybrid right claim, that of free exercise of religion when attached to the right to vote, is not valid (App. 9a). The Sixth Circuit held that even in a hybrid situation where the statute is generally applicable, not aimed at particular religious practices, and free of a system of particularized exceptions, the statute is not violative of a hybrid right. They relied on a

free exercise claim when attached to the statutory right to collect unemployment compensation benefits, *Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990), the statutory right to obtain an education at a public university, *Kissinger v. Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993), and the statutory right to obtain a building permit, *City of Boerne v. Flores*, 521 U.S. 507, 512-514 (1997).

Many times this court has held that a hybrid right is not to be regarded and/or treated in the same manner as the type of free exercise claims that were presented in *City of Boerne*, *Kissinger*, and *Smith*. The hybrid right consists of the free exercise claim along with another constitutionally protected claim such as the right of parents to educate their children, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the right to freedom of the press, *Follett v. Town of McCormick*, 321 U.S. 573 (1944), *Murdock v. Pennsylvania*, 319 U.S. 106 (1943), and the right to freedom of speech, *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

This court has consistently stated that a hybrid right involves the "Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press" (*see Smith* at 881, citing *Cantwell*, *Murdock*, etc. as above). Additionally, this court stated that "the only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* court noted were cases in which other constitutional protections were at stake" (see *City of Boerne* at 513-14, citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The courts below either have not been able, or have been unwilling, to distinguish a free exercise claim attached to another constitutionally protected right; from that of a free exercise claim attached to a statutory right. Clearly, there is a difference.

Petitioner is unable to locate a citation where this court has considered such a hybrid right, that of free exercise of religion when attached to the constitutionally protected right to vote. As this issue is material in determining Petitioner's claims regarding his most basic right to vote, this court should grant certiorari on question one (1) of this petition.

VIII.

THE DECISIONS OF THE COURTS BELOW REGARDING PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND PRIVILEGES AND IMMUNITIES ARE IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The courts below have held that Petitioner's right to due process of law and privileges and immunities have not been violated (App. 10a) because his statutory and other constitutional rights, as discussed herein, have not been violated. As this court reviews the entire matter it will reach a different conclusion upon determination that all of Petitioner's other rights have, in fact, been violated.

The courts below have relied on *Storer v. French*, 58 F.3d 1125, 1128 (6th Cir. 1995), to indicate that Petitioner's due process and privileges and immunities (Fourteenth Amendment) have not been violated where Congress has imposed or authorized the infringement (App. 10a). Also, the courts below have relied on *Hague v. Committee For Indus. Org.*, 307 U.S. 496 (1939), to indicate that Petitioner has not been discriminated against. Clearly, Petitioner's privileges and immunities, under both clauses, have been violated as a result of the incorrect and *ultra vires* findings and conclusions of the courts below.

As these issues are material in determining Petitioner's claims concerning his most basic right to vote, this court should grant certiorari on question sixteen (16) of this petition.

CONCLUSION

For the foregoing reasons, Martin S. McKay respectfully requests that his Petition For Certiorari be granted.

Respectfully Submitted,

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Chattanooga, TN 37421
(423) 778-3286
Petitioner *Pro Se*

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. - _____

In The
Supreme Court Of The United States

MARTIN S. MCKAY,

Petitioner,

UNITED STATES OF AMERICA,

Intervenor,

v.

BROOK THOMPSON,
Individually and as
Coordinator of Elections,
State of Tennessee,

RILEY C. DARNELL,
Secretary of State,
State of Tennessee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[Entered 10/27/00]

No. 99-6598

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN S. MCKAY,
Plaintiff-Appellant,

UNITED STATES OF AMERICA,
Intervenor,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary Of State,
State Of Tennessee,
Defendants-Appellees,

BEFORE: KENNEDY and NORRIS, Circuit Judges; and KATZ,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

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* Hon. David A. Katz, United States District Court for the Northern District of Ohio, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
CLERK

APPENDIX B

[Entered 09/18/00]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN S. MCKAY,
Plaintiff-Appellant,

UNITED STATES OF AMERICA,
Intervenor,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendants-Appellees,

CAROLYN JACKSON, individually and as
Administrator of Elections,
Hamilton County, Tennessee,
CLAUDE RAMSEY, County Executive,
Hamilton County, Tennessee,

Defendants.

No. 99-6598

Appeal from the United States District Court

for the Eastern District of Tennessee at Chattanooga.
No. 98-00354--Curtis L. Collier, District Judge.

Submitted: August 1, 2000

Decided and Filed: September 18, 2000

Before: KENNEDY and NORRIS, Circuit Judges; KATZ, District Judge.*

COUNSEL

ON BRIEF:

Stephanie R. Marcus, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Intervenor.
Janet M. Kleinfelter, OFFICE OF THE ATTORNEY GENERAL, FINANCIAL DIVISION, Nashville, Tennessee, for Appellee.
Martin S. McKay, Chattanooga, Tennessee, pro se.

OPINION

ALAN E. NORRIS, Circuit Judge. *Pro se* plaintiff Martin S. McKay brought suit in district court against two

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Tennessee state election officials and two Hamilton county election officials, in their official and individual capacities.[1] McKay wishes to stop Tennessee from continuing its practice of requiring its citizens to disclose their social security numbers as a precondition to voter registration. The district court granted summary judgment for defendants. McKay now appeals. Upon de novo review, we affirm for the reasons stated below.

I.

A. Statutory Construction of the Tennessee Statute

We begin by noting that the Tennessee code provides that: "[a] citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter *unless the citizen is disqualified under the provisions of this title* or under a judgment of infamy pursuant to § 40-20-112." TENN. CODE ANN. § 2-2-102 (1994) (emphasis added). Therefore, other provisions of the title may disqualify a citizen for failing to submit a social security number during the registration process. We have been unable to locate a published Tennessee state court decision indicating whether Tennessee law actually requires social security numbers for voter registration.[2]

In the case at bar the Tennessee Coordinator of Elections and the Tennessee Secretary of State, both defendants in this litigation, have made a final administrative

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[1] The two county officials were dismissed from the case and are not parties to this appeal.

[2] An unpublished decision, *Carter v. Dunn*, No. 12507 (Tenn. Ct. App. 1976), suggests that social security number disclosure is mandatory.

determination that Tennessee law requires McKay to disclose his social security number in order to register to vote. We are reluctant to overrule such an interpretation when the meaning ascribed by state officials appears to be reasonable, presents no conflict with previous caselaw, and can be readily challenged by McKay in state court.

B. Privacy Act of 1974, Public L. No. 93-579, § 7

McKay argues Tennessee is prohibited by Public Law 93-579, section 7, an uncodified provision of the Privacy Act, from conditioning the right to vote upon the disclosure of one's social security number. *See* Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909 (1974).[3] To support

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[3] Section 7 provides that:

(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the [The] provisions of paragraph (1) of this subsection shall not apply with respect to –

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of a individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

this argument, he relies upon *McKay v. Altobello*, No. 96-3458, 1996 WL 266717 (E.D. La. May 16, 1997), a case he successfully litigated to force Louisiana to allow him to vote without disclosing his social security number.

The district court correctly distinguished *Altobello* on the ground that Tennessee, unlike Louisiana, had maintained "a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual." Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909. Tennessee enacted its statute requiring social security numbers for voter registration in 1972. The court also correctly concluded that when McKay failed to respond to the motion for summary judgment, he defaulted on his duty to produce affirmative evidence capable of raising a material question of fact about whether the state had a "system of records" in effect prior to the enactment of the Privacy Act. *See, e.g., Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (discussing nonmovant's affirmative burden). We decline to entertain the arguments regarding other material questions of fact raised for the first time in McKay's reply brief. *See United States v. Jerkins*, 871 F.2d 598, 602 n. 3 (6th Cir. 1989).

C. National Voter Registration Act, 42 U.S.C. § 1973gg-3(c)(2)(B)

McKay also points to section 2-2-116 of the Tennessee state code, which requires disclosure of a social security number as a pre-condition to voter registration. *See* TENN. CODE ANN. § 2-2-116 (Supp. 1999). He argues that this provision violates the National Voter Registration Act ("NVRA") because a social security number is not essential to accomplishing the limited permissible purposes identified in

42 U.S.C. § 1973gg-3(c)(2)(B). According to McKay, 42 U.S.C. § 1973gg-3(c)(2)(B) permits the state to only "require the minimum amount of information necessary" to prevent duplicate voter registration and determine whether he is eligible to vote.

The district court properly rejected McKay's argument. The NVRA does not specifically forbid use of social security numbers. As previously discussed, the Privacy Act contains a more specific "grandfather" provision that Congress intended to survive the more general provisions of the NVRA. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

D. Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B)

Count three of McKay's complaint alleged a violation of 42 U.S.C. § 1971(a)(2)(B), a provision of the Civil Rights Act of 1964. He argues that his social security number was not "material" to determining his qualification for voting, and therefore his omission of that information cannot be grounds for refusing his registration. The district court correctly dismissed this claim for lack of standing. Section 1971 is enforceable by the Attorney General, not by private citizens. *See* 42 U.S.C. § 1971(c); *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996).

D. Constitutional Claims as Enforced Pursuant to 42 U.S.C. § 1983

McKay asserts five constitutional claims in support of his 42 U.S.C. § 1983 action.

We reject McKay's first claim that his fundamental right to vote was unconstitutionally burdened by the social security number disclosure requirement. *See Greidinger v. Davis*, 988 F.2d 1344, 1352-54 & n.10 (4th Cir. 1993) (indicating that Virginia's voter registration scheme would not violate the fundamental right to vote if its scheme had merely provided for receipt and internal use of the social security number by Virginia electoral officials).

We also reject McKay's second claim that the enforcement of section 2-2-116 of the Tennessee state code unconstitutionally infringed upon his First Amendment right to free exercise of religion, as incorporated by the Fourteenth Amendment, by forcing him to violate his religious beliefs in order to vote.[4] A state law that is rationally related to a legitimate state purpose will be upheld against a free exercise claim, even in a "hybrid" situation involving other fundamental rights such as voting, so long as the law is generally applicable, not aimed at particular religious practices, and free of a system of particularized exceptions. *See Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990); *Kissinger v. Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993). McKay's reliance upon *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C. Cir. 1987), is misplaced because that case utilized the least restrictive means/compelling state interest standard subsequently overruled by *Smith*. *See City of Boerne v. Flores*, 521 U.S. 507, 512-14 (1997).

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[4] According to McKay, the biblical book of revelation, chapter 13, verses 16 through 18, warns against government use of universal identifiers as a condition for engaging in commerce or other vital activities such as voting.

McKay claims that the Tennessee statute violates the Privileges and Immunities Clause of Article IV of the Constitution. See U.S. CONST. art. IV, § 2, cl. 1. This clause requires only that states give to citizens of every other state the same privileges and immunities that their own citizens enjoy. *See Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511 (1939). Defendants did not discriminate against McKay because everyone, whether a state citizen or not, was required to comply with the voter registration laws in order to vote in Tennessee.

McKay asserts he was deprived of his right to vote without procedural due process of law, a violation of the Fifth and Fourteenth Amendments, because he was disqualified as a voter without having been properly convicted of a crime. He also alleges a violation of the Privileges and Immunities Clause of the Fourteenth Amendment because his right to vote is unique to national citizenship and bestowed by operation of Constitutional and federal statutory law. *See Shapiro v. Thompson*, 394 U.S. 618, 667 (1969) (Harlan, J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 79-80 (1872). These claims fail because they are based upon the flawed proposition that Tennessee's social security number disclosure requirement violates a federal statute or deprives him of his constitutional rights of voting and free exercise of religion. *See, e.g., Storer v. French (In re Storer)*, 58 F.3d 1125, 1128 (6th Cir. 1995) (indicating that the Privileges and Immunities Clause of the Fourteenth Amendment affords no protection where Congress has imposed or authorized the infringement).

E. Eleventh Amendment Immunity and Denial of Certification to the Attorney General

The district court correctly determined that the Eleventh Amendment permits prospective injunctive relief, but not damage awards, for suits against individuals in their official capacities under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989). However, as the United States points out on appeal as an intervening party, the court erred in adopting the defendant Tennessee officials' position that the Eleventh Amendment immunity barred McKay from gaining any relief for his claims under federal law because prospective injunctive relief was possible for him in theory. *See Lawson v. Shelby County, Tenn.*, 211 F.3d 331, 335 (6th Cir. 2000). Nonetheless, the district court's error does not affect the outcome of this case in light of our finding that all of McKay's claims are without substantive merit.

McKay also complains he was prejudiced by the district court's repeated refusal to certify his case to the United States Attorney General under 28 U.S.C. § 2403(a). Because of defendants' attempted invocation of Eleventh Amendment immunity against the Privacy Act claim, certification was arguably not discretionary for this case and should not have been delayed until the appellate stage of litigation. *See* 28 U.S.C. § 2403(a); *Jones v. City of Lubbock*, 727 F.2d 364, 372 (5th Cir. 1984); *Wallach v. Lieberman*, 366 F.2d 254, 257 (2d Cir. 1966). However, we decline to hold that the district court was without jurisdiction on the basis of a technical violation of the 28 U.S.C. § 2403 certification requirement because McKay's claims lack merit on their face; therefore he has suffered no harm as a result of the court's action. *See Wallach*, 366 F.2d at 258.[5]

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[5] Contrary to McKay's assertions, the technical certification violation occurred only with respect to the Privacy Act and has no relevance to 42 U.S.C. § 1971(c), a provision in the Civil Rights Act of 1964. Defendants asserted the

II.

We affirm the district court's grant of summary judgment.

Eleventh Amendment defense only against enforcement of the Privacy Act, and thus the constitutionality of the Civil Rights Act was never "drawn in question" as required to trigger 28 U.S.C. § 2403. The provision in 42 U.S.C. § 1971(c) does not help McKay because the provision merely allows the Attorney General to "institute ... [a] proper proceeding for preventive relief" instead of requiring certification or permission for intervention. *Compare* 42 U.S.C. § 1971(c) *with* 28 U.S.C. § 2403(a). Thus, McKay cannot evade his lack of standing for his Civil Rights Act claim by speculating that the Attorney General would have invoked 42 U.S.C. § 1971(c) on McKay's behalf if the case had been properly brought to her attention through certification under 28 U.S.C. § 2403.

APPENDIX C

[Entered 10/29/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee;
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendants

No. 1:98-CV-354
Judge Curtis L. Collier

ORDER

Before the court is a Motion by Defendant Brook Thompson, in his individual capacity and as Coordinator of elections for the State of Tennessee, and Defendant Riley Darnell, in his official capacity as Secretary of State for the State of Tennessee, (collectively "Defendants") for Summary

Judgement (Court File No. 27). Defendants filed a brief in support of their motion (Court File No. 29). Plaintiff Martin S. McKay ("McKay") did not file a response. McKay claims a Tennessee law (*Tenn. Code Ann.* 2-2-116) requiring an individual disclose and be identified by his or her Social Security number in order to register to vote violates the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973 *et seq.*, a provision of the Privacy Act of 1974, 5 U.S.C. § 552a, and the Civil Rights Act of 1964, 42 U.S.C. § 1971, as well as several provisions of the United States Constitution.

After reviewing all of the evidence in the light most favorable to Plaintiff, the Court concludes, as a matter of law, McKay cannot prove his federal statutory or constitutional claims at trial. Therefore, in accordance with the accompanying memorandum, Defendants Motion for Summary Judgement is **GRANTED.**

SO ORDERED.

ENTER:

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Entered 10/29/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendants

No. 1:98-CV-354
Judge Curtis L. Collier

MEMORANDUM

Before the court is a Motion by Defendant Brook Thompson, in his individual capacity and as Coordinator of elections for the State of Tennessee, and Defendant Riley Darnell, in his official capacity as Secretary of State for the State of Tennessee, (collectively "Defendants") for Summary

Judgement (Court File No. 27). Defendants filed a brief in support of their motion (Court File No. 29). Plaintiff Martin S. McKay ("McKay") did not file a response. McKay claims a Tennessee law (*Tenn. Code Ann.* 2-2-116) requiring an individual disclose and be identified by his or her Social Security number in order to register to vote violates the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973 *et seq.*, a provision of the Privacy Act of 1974, 5 U.S.C. § 552a, and the Civil Rights Act of 1964, 42 U.S.C. § 1971, as well as several provisions of the United States Constitution. For the following reasons the Court will **GRANT** Defendants' motion..

I. STANDARD OF REVIEW

Under *Fed. R. Civ. P.* 56(c), the Court will render summary judgement if there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. The burden is on the moving party to conclusively show no genuine issue of material fact exists, *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Kentucky Div., Horsemen's Benev. & Prot. Assoc., Inc. v. Turfway Park Racing Assoc., Inc.*, 20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow*, 44 F.3d 426,429 (6th Cir. 1995); *City Management Corp. v. U.S. Chemical Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must

come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411; *see also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-406 (6th cir. 1992) (holding courts do not have the responsibility to search *sua sponte* the record for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgement. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgement mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes a fair minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgement. *Id.; Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411.

II. RELEVANT FACTS

The relevant facts are not in dispute. On June 21, 1998, Plaintiff McKay attempted to register to vote during a voter registration drive at St. Stephen Catholic Church. After

being advised by individuals representing the Hamilton County Election Commission ("Election Commission") his SSN would be required in order to register, McKay declined to complete the application. According to McKay, disclosing his SSN in such a manner is contrary to his religious beliefs.[1] On June 30, 1998, while obtaining a Tennessee driver's license, McKay again decided not to register to vote because his SSN would have been required. Then, on July 29, 1998, McKay went to the office of the Election Commission and attempted to register to vote. However, McKay was again informed a SSN would be required.

On August 10, 1998, McKay returned to the Election Commission and spoke to the Administrator of Elections, Carolyn Jackson. McKay informed Jackson he had prevailed in litigation in Louisiana regarding that state's collection of SSN's on voter registration applications. Jackson still would not allow McKay to register to vote unless he provided his SSN. Nevertheless, on that same day, McKay completed a voter registration application and submitted it to the Election Commission. On September 3, 1998, McKay received an "Application for Voter Registration Status Notification" from the Election Commission which, in pertinent part, stated, "Your application for voter registration form is temporarily rejected [because] ... [y]ou failed to provide your social security number" (emphasis in original).

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[1] McKay contends "the language of Revelations [sic] [warns] of government use of universal identifiers as a condition of engaging in commerce or other vital activities such as voting" (Court File No. 1, pp. 13-14, n. 7). McKay "views the [SSN] as such a universal identifier" (*Id*). Apparently McKay refers to the biblical Book of Revelation, Chapter 13, verses 16 through 18.

Other significant events occurred with respect to McKay's attempts to register to vote. On August 17, 1998, McKay sent a facsimile to Defendant Brook Thompson, Coordinator of Elections for the State of Tennessee. In the facsimile, McKay listed the efforts he had taken to register to vote. McKay ended the correspondence with the following, "As per 42 U.S.C. 1973gg-9(b)(2) a period of 20 days is allotted to remedy this abridgement. If at that time, the violation is not resolved, I will file a complaint in U.S. District Court seeking injunctive, declaratory and/or other relief which may include, but is not limited to, monetary damages for violation of my constitutional right without due process." On September 10, 1998, McKay's attorney, Jes Beard, also spoke with Jackson, Thompson, and Beth Henry Robinson, an attorney in Thompson's office, regarding McKay's desire to register to vote. The position of the Election Commission was unchanged.

On October 14, 1998, McKay filed suit in this Court against Defendants Brook Thompson, individually and as Coordinator of Elections for the State of Tennessee; Riley Darnell, as Secretary of State for the State of Tennessee; Carolyn Jackson, individually and as Administrator of Elections for Hamilton County, Tennessee; and Claude Ramsey, as County Executive for Hamilton County, Tennessee (Court File No. 1). Jackson and Ramsey were subsequently dismissed from this action. McKay also filed a Motion for a Temporary Restraining Order (Court File No. 4). In the motion, McKay sought to enjoin the Defendants from continuing to enforce *Tenn. Code Ann.* § 2-2-116 with respect to requiring a SSN on voter registration applications. McKay also sought an order requiring the Defendants to register him to vote for the upcoming November, 1998 elections. Believing there would be no irreparable injury in the short period it would take to notify the Defendants, the

Court denied McKay's Motion for a Temporary Injunction. However, the court set a hearing for October 29, 1998 to determine the propriety of issuing a preliminary injunction. The Court held such a hearing on October 29 and 30, 1998 and in an order filed November 2, 1998, denied McKay's Motion for a Preliminary Injunction.

III. DISCUSSION

The motion the Court before reveals an unfortunate, yet all too frequent, occurrence. When facing a potentially dispositive motion, the non-movant chooses not to respond. Not responding works a disservice upon American jurisprudence: the adversary system serves the dual purposes of defending against meritorious cases and discarding those without merit. Courts disfavor reviewing a dispositive motion without the benefit of the non-movant's interpretation of applicable case authority or indication of significant, supporting facts, because rarely does a single perspective capture enough of the substance of a case to support comfortably a court's decision.

Yet, undoubtedly, it is not a court's responsibility to argue a party's position. The parties must litigate their cases. The Eastern District of Tennessee hopes to emphasize the importance of motion practice by signaling to parties that the "[f]ailure to respond to a motion may be deemed a waiver of any opposition to the relief sought." *Local Rules of the E.D. of Tenn.* 7.2. Courts hesitate to rely strictly on this type of rule and have developed other ways to manage cases efficiently and fairly. Invariably, though, the practical effect of failing to respond to a dispositive motion undermines the non-movant's case and very often produces the same result.

In Count One of his Complaint (Court File No. 1), McKay alleges a violation of the NVRA 42 U.S.C. § 1973gg-3(c)(2)(B). He argues this provision authorizes the state of Tennessee to collect only "the 'minimum amount of information necessary' to prevent duplicate voter registration and to determine whether [an applicant] is eligible to vote." In response, Defendants argue the NVRA in conjunction with related statutory schemes, specifically authorizes the state to use a person's SSN as a means of identifying voters. McKay argues in Count Two that *Tenn. Code Ann.* § 2-2-116 violates the Privacy Act of 1974, specifically Public Law 93-579, Section 7. The provision prevents state governments from denying an individual any rights, benefits or privileges provided by law simply because the individual refuses to furnish his SSN. Defendants maintain however the Tennessee statute falls within a "grandfather clause" exception to this provision allowing a state to require disclosure of a SSN provided the statutory scheme requiring disclosure was enacted prior to January 1, 1975. Additionally, Defendants raise an Eleventh Amendment sovereign immunity defense to McKay's Privacy Act claim.

In Count Three, McKay claims Tennessee's requirement of SSN disclosure also violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B). This provision forbids a state from denying:

> [T]he right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election.

42 U.S.C. § 1971(a)(2)(B) (1999). The Defendants argue this provision does not provide a private cause of action and may only be enforced by the Attorney General. McKay's final claim is asserted pursuant to 42 U.S.C. § 1983 for various constitutional violations, including unlawful abridgement of his right to vote and unconstitutional restrictions on his First Amendment right to free exercise of religion.

For purposes of clarity, the Court in its opinion addresses each of McKay's statutory claims in the order in which they are raised in his complaint. The discussion of statutory claims is then followed by an analysis of Plaintiff's constitutional challenges.

A. National Voting Rights Act, 42 U.S.C. § 1973gg-3(c)(2)(B)

In Count One of his Complaint, McKay asserts Tenn. Code Ann. § 2-2-116, requiring an individual to reveal his or her SSN as part of the voting registration process, violates the NVRA. Specifically, McKay maintains 42 U.S.C. § 1973gg-3(c)(2)(B) permits the state to require only the "'minimum amount of information necessary' to prevent duplicate voter registration and to determine whether plaintiff is eligible to vote," and because an individual's SSN is inessential to those limited purposes, Tennessee may not lawfully require it as a prerequisite to registration. In support of this argument, McKay points to the State's own practice of allowing individuals who do not have a SSN to register and maintains *Tenn. Code Ann.* § 2-2-102[2] sets forth the sole

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[2] "A citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or under a judgement of infamy pursuant to § 40-20-112."

requirements for eligibility as residence within the state and attainment of the age of legal majority (18).

The federal statutory provision to which McKay refers actually regulates the use of driver's license applications as simultaneous voter registration applications. Assuming for the sake of argument this statute applies to McKay's situation, its exact language provides the State may require only such information as is necessary to 1) "prevent duplicate registrations," and 2) "enable State election officials to assess the eligibility of the applicant and to administer voter registration and *other parts of the election process*." 42 U.S.C. § 1973gg-3(c)(2)(B) (1999) (emphasis added). Surely, preventing voter fraud is an essential part of the election process.

McKay, in his Complaint, acknowledges, "Tennessee uses [a SSN] only for the expressed purpose of determining if an individual is attempting to commit fraud by trying to register and to vote more than once," (Court File No. 1, p. 9). Often there are several voters with the same name and, at times, voters will have both the same name and the same birth date. A SSN provides an unique identifier to assist in the prevention of duplicate voter registration. While a few voters may not have a SSN, the vast majority of registrants will. As a result, SSN's provide an efficient and reliable means of identifying those applicants who may be trying to register more than once, as well as those applicants who are ineligible to vote because they have been convicted of a crime. This holds true even though the State might have to make occasional exceptions in the rare case an applicant does not have a SSN.

Tenn. Code Ann. § 2-2-102 (1998).

Based on this reasoning, the Court concludes a SSN falls within the "minimum amount of information necessary to, ... enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-3(c)(2)(B). The Court therefore holds the facts on this record, even when viewed in the light most favorable to McKay, would not support a finding *Tenn. Code Ann.* § 2-2-116 oversteps the authority granted by section 1973gg-3(2)(B) of the NVRA.

B. Privacy Act of 1974, Public Law 93-579, Section 7

McKay argues in Count Two of his Complaint that Tennessee is prohibited by Public Law 93-579, Section 7, an uncodified provision of the Privacy Act,[3] from conditioning the right to vote on the disclosure of one's SSN. Plaintiff relies on a Louisiana district court case in which he litigated the same issue, *McKay v. Altobello*, No. 96-3458 (E.D.La. May 16, 1997) (slip op., Judge Livaudais), to support his interpretation of this statute. After a review of that case, the Court concludes the situation at hand is distinguishable.

The decision in *Altobello* rested on Judge Livaudais's conclusion Louisiana failed to prove it fell within a statutory exemption allowing a state to require disclosure of SSN's during voter registration as long as the State maintained "a

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[3] Section 7(a)(1) can be found as an historical note to 5 U.S.C. § 552a, and provides: "It shall be unlawful for any Federal, State, or local government agency to deny any individual any right, benefit or privilege ... because of such individual's refusal to disclose his social security account number."

system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual." 5 U.S.C. § 7(a)(2) (1999). *Tenn. Code Ann.* § 2-2-116, enacted in 1972, specifically requires disclosure of the registrant's SSN.[4] In *Carter v. Dunn*, No. 12507 (Tenn. Ct. App. Dec. 3, 1976), the Tennessee Court of Appeals held section 2-2-116 requires this information as a means of identifying the registrant.

While McKay presented testimony at the preliminary injunction hearing that, at times, here in Hamilton County, different voter registration forms were utilized, and, on two or three occasions, a SSN was excluded, this evidence does not speak to whether Tennessee had a system of records in existence and operating before January 1, 1975. The uncontroverted record evidence proves Tennessee has required disclosure of one's SSN as a prerequisite for voter registration and has used that information as a means of identifying individual registrants since 1972. Section 2-2-116 therefore falls within the section 7(a)(2) exception for "a system of records [requiring the disclosure of one's SSN] in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual."

In addition to concluding section 2-2-116 is excepted from section 7(a)(1) of the Privacy Act, the Court holds McKay's suit against all Defendants in their official capacities is barred by the Eleventh Amendment. The eleventh

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[4] Section 2-2-116 provides an example of a voter registration form. The form contains a space for "Social Security number, if any." The statute further mandates the form "shall contain all the information required before being signed by the registrant." *Tenn. Code. Ann.* § 2-2-116.

Amendment immunizes the states from all suits in federal court brought by their own citizens or citizens of other states. *Seminole Tribe of Florida v. Florida*, 517 U.S. 53, 54 (1996). "[S]uits against state officers or employees, in their official capacities, are suits against the state. *Lawson v. Tennessee*, 7 F.Supp.2d 985, 988 (W.D.Tenn. 1998). Accordingly, the Defendants, having been sued in their official capacities, are treated as the state of Tennessee for purposes of the Court's Eleventh Amendment analysis. The States' sovereign immunity may only be abrogated through consent of the State or an act of Congress. *Id.* At 54-55. In this case, Defendants have raised an Eleventh Amendment immunity defense in response to McKay's Privacy Act claim. They have not consented to the Court's exercise of jurisdiction. As a result, Defendants in their official capacities, are only susceptible to suit in this case if Congress in passing the Privacy Act effectively abrogated the states' Eleventh Amendment sovereign immunity.

"In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity;' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* At 55 (citations omitted). The Privacy Act does not contain any clear congressional statement of intention to abrogate the States' Eleventh Amendment immunity. Section 7, which has never been codified, clearly applies to both state and federal agencies. This provision, however, does not set forth any clear remedy for violation of its mandates. Instead, the courts have implied a cause of action for individuals who have been injured by an agency's failure to comply with section 7. *Greater Cleveland Welfare Rights Org. v. Butler*, 462 F.Supp. 1313, 1319-20 (N.D. Ohio 1978).

This implied right to sue fails to satisfy the "clear legislative statement," required in order to abridge the States' Eleventh Amendment immunity. Even a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985). Congress, in enacting Section 7, did not even clearly authorize a cause of action in federal court for violation of its provisions, and thus fell far short of the standard set by the Supreme Court for Congressional abrogation of the States' Eleventh Amendment sovereign immunity. The Eleventh Amendment, therefore, precludes an action by McKay against Defendants in their official capacities.

C. Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B)

Count Three of McKay's complaint alleges a violation of 42 U.S.C. § 1971(a)(2)(B), a provision of the Civil Rights Act of 1964. This statute provides:

> (2) No person acting under color of law shall –
>
> (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified to under State law to vote in such election; ...

McKay makes a persuasive argument his SSN is not "material" to determining his qualification for voting; and therefore, his omission of that information cannot be grounds for refusing his registration. He argues the qualifications for

voting are set forth at *Tenn. Code Ann.* § 2-2-102 and basically require only that the voter is a resident who has maintained the age of majority (18). SSN's, McKay maintains, are used only to determine whether a registrant is trying to perpetrate a fraud on the polls and not whether the person is in fact qualified to vote.

Regardless of the merits of his arguments, however, McKay lacks standing to enforce this particular statutory provision. The statutory language provides "the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proceeding for preventive relief," to remedy violation of the Act. Neither the statute, nor case law interpreting it, however, gives a private cause of action to individual citizens. *See Willing v. Lake Orion Community School Bd. Of Trustees*, 924 F.Supp. 815, 820 (E.D. Mich. 1996) ("Section 1971 ... is enforceable by the Attorney General, not by private citizens.").

D. Constitutional Claims Pursuant to 42 U.S.C. § 1983

In addition to asserting the statutory claims discussed above, McKay's complaint also requests, pursuant to 42 U.S.C. § 1983,[5] relief for several alleged constitutional violations. As a preliminary matter the Court notes suits against individuals in the official capacities for damages are the equivalent to suits against the State and are not cognizable in this Court under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989) (holding state officials, sued in their official capacities, are not "persons" within meaning of section 1983 when sued for

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[5] "Section 1983 creates a federal cause of action for constitutional violations." *Estes v. Morris*, 142 F.3d 433 (table), 1998 WL 69009, at *2 (6th Cir. Feb. 11, 1998).

damages). As a result, McKay cannot, on any set of facts, maintain his section 1983 suit against Defendants in their official capacities to the extent he is seeking damages for past constitutional violations. Plaintiff's remaining section 1983 claims against Defendants for prospective injunctive relief and against Defendant Brook Thompson individually for injunctive relief and damages include: 1) unconstitutional burdening of his right to vote, 2) deprivation of his right to vote without due process of law, 3) violation of both Privileges and Immunities Clauses and 4) unconstitutional interference with his First Amendment right to free exercise of religion. These claims are discussed below.

First, McKay claims his right to vote was unconsitutionally conditioned on the disclosure of his SSN. He relies on a Fourth Circuit opinion in which the Court held the plaintiff's "right to vote [was] substantially burdened by the public disclosure of his [SSN]." *Greidinger v. Davis*, 988 F.2d 1344,1354 (4th Cir. 1993). That case held "Virginia's voter registration scheme impose[d] a substantial burden on [plaintiff's] fundamental right to vote only to the extent the scheme permit[ted] the public disclosure of his SSN." *Id.* At n.10. Because the Fourth Circuit held Virginia's statutory scheme substantially burdened an individual's right to vote, it applied a strict scrutiny analysis and required the state to show the scheme was narrowly tailored to serve a compelling state interest. *Id.* At 1352-54. The Court in *Greidinger* specifically stated, however, "[I]f the scheme provided for only the receipt and internal use of the SSN by Virginia, no substantial burden would exist." *Id.*

McKay's situation can be distinguished from that of the plaintiff in *Greidinger*. In *Greidinger*, Virginia stipulated it routinely disclosed SSN's along with other voter registration information to political parties and candidates and

made no effort to redact the SSN's from voter registration records made available to the public. During the preliminary injunction hearing in this case, Defendants maintained Tennessee has a policy of not disclosing voters' SSN's. McKay maintains the possibility of public disclosure still exists as a court could order the Election Commission to provide such information. He has not presented any evidence that a court has ever done so. This argument is speculative at best. *Tenn. Code Ann.* § 2-2-127 on which McKay relies states, "[p]ermanent [voter] registration records as public records shall be kept in a safe place by the commission, shall be available for public inspection, and may not be removed from the office of the commission except as required ..." The statute requires only that permanent records be kept and made available to the public. It does not mandate inclusion of information regarding voters' SSN's. This provision was amended by Public Chapter No. 88, which went into effect on April 12, 1999. As it is now written, section 2-2-127 requires SSN's to be redacted from "any voter registration records" before making them available to the public.

Similarly, another statute upon which McKay relies, *Tenn. Code Ann.* § 2-2-138, requires the commissioners of elections to prepare lists of registered voters. These lists "and any other voter registration information ... *if compiled*," (emphasis added) must then be made available for purchase. While the Court concedes a list of voters' SSN's might theoretically be compiled along with their names, birth dates, addresses and other information, section 2-2-138 does not require compilation or disclosure of this information. In light of Tennessee's policy of non-disclosure as well as the amendments to section 2-2-127 prohibiting disclosure of SSN's, the purely speculative possibility of public disclosure does not present the "substantial burden" that justified the Fourth Circuit's ruling in *Greidinger*.

The Court concludes Plaintiff has failed to present evidence sufficient to support a conclusion Tennessee law conditions a person's right to vote on public disclosure of his or her SSN. The statutory scheme provides "for only the receipt and internal use" by Tennessee of a registered voter's SSN. *Greidinger*, 998 F.2d at 1354, n. 10. As a result, the disclosure required by section 2-2-116 does not constitute a substantial burden requiring strict scrutiny analysis. *See, id.*, at 1352-54. Even assuming the burden was still substantial enough to justify strict scrutiny, this Court agrees with the Fourth Circuit that a statutory scheme providing only for internal receipt and use of voters' SSN's is narrowly tailored to serve the compelling state interest of "identifying voter duplication and tracking felons." Id. At 1354, n. 11. As a result, the Court holds McKay cannot, as a matter of law, prevail on a section 1983 action premised upon the argument section 2-2-116 unconstitutionally burdens his right to vote.

In his second constitutional challenge, McKay asserts he has been deprived of his right to vote without due process of law, a violation of the Fifth and Fourteenth amendments. He argues he has not been convicted of any crime for which the right to vote may be denied. This argument is true, however, the state may require him to be registered in order to vote. Furthermore, as discussed above, the state of Tennessee may also require McKay to disclose his SSN, along with other information as a prerequisite to registration. Like everyone else in this state, Plaintiff could have registered to vote at any time had he chosen to comply with the uniformly applied statutory requirements. Because there is nothing unconstitutional about Tennessee's voter registration scheme, and because McKay's right to vote was denied pursuant to this validly enacted scheme, his due process challenge to the State's action fails as a matter of law.

McKay also asserts section 2-2-116 violates the Privileges and Imunities Clause of Article 4, Section 2 and the Fourteenth Amendment. The Privileges and Imunities Clause of Article 4, Section 2 requires only that states give to every citizen of every other state the same privileges and immunities that their own citizens enjoy. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511 (1939). McKay was treated as all Tennessee residents are treated. Defendants did not discriminate against him in any way because everyone, whether a citizen of the state or not, must comply with the Tennessee voter registration laws in order to vote in Tennessee. This includes providing a SSN as required by section 2-2-116. Because section 2-2-116 applies to everyone, regardless of his or her state citizenship, it does not violate the Privileges and Immunities Clause of Article 4, Section 2.

The Privileges and Immunities Clause of the Fourteenth Amendment, on the other hand, protects only those rights unique to national citizenship. *Shapiro v. Thompson*, 394 U.S. 618, 667 (1969); *see also Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 79-80 (1873). This provision in essence prevents the states from abridging the rights given to all U.S. citizens by operation of Constitutional and federal law. These rights include the right to vote in federal elections. *Slaughter-House Cases*, 83 U.S. (16 Wall) at 79. The Court presumes this is the right McKay claims is abridged by section 2-2-116. Section 2-2-116 does place a limitation on an individual's right to vote in federal elections. "However, the Supreme Court has indicated that the Privileges and Immunities Clause of the Fourteenth Amendment affords no protection where Congress has imposed or authorized the infringement." *Storer v. French*, 58 F.3d 1125, 1128 (6th Cir. 1995).

In this case, Congress, in the Privacy Act of 1974, specifically authorizes the states to require disclosure of SSN's as a prerequisite to voter registration, provided the statutory scheme requiring disclosure falls within the exemption provision of section 7(a)(2). As discussed in part III. B. above, section 2-2-116 satisfies all of the 7(a)(2) exemption conditions. In this case, therefore, any abridgement of McKay's right to vote has been authorized by Congress by way of section 7(a)(2) of the Privacy Act. As a result, under the rule set forth in *Storer*, section 2-2-116 does not violate the Privileges and Immunities Clause of the Fourteenth Amendment.

In his final constitutional challenge, McKay claims section 2-2-116 unconstitutionally infringes his First Amendment right to free exercise of religion. The United States Court of Appeals for the Sixth Circuit follows the standard set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990), when evaluating free exercise challenges. *Kissinger v. Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993). This standard requires the Court to uphold a state law that is rationally related to a legitimate state purpose, provided the law is: 1) generally applicable, 2) not aimed at particular religious practices, and 3) free of a system of particularized exemptions. *Smith*, 494 U.S. at 877-78. After evaluating section 2-2-116 in light of these criteria, the court concludes the law does not unconstitutionally infringe Plaintiff's right to vote.

First, section 2-2-116 is generally applicable. All potential voters must disclose their SSN's, if they have one, in order to register. On its face, the law appears to be neutral, and McKay has not presented any evidence it is aimed at a particular religious group or practice. Nor does

the law contain a system of particularized exemptions. McKay argues section 2-2-116 exempts those who do not have SSN's, however, this is not a particularized exemption. Tennessee requires everyone who has a SSN to disclose it. The State does not distinguish between similarly situated individuals, allowing some to claim an exemption from the law's application, while others may not. Finally, the disclosure requirement is, at the very least, rationally related to the legitimate state interests of preventing voter fraud and identifying felons ineligible to vote. Because section 2-2-116 satisfies the criteria set forth in *Smith*, it does not unconstitutionally burden McKay's First Amendment right to free exercise of religion by requiring him to disclose his SSN as a prerequisite to voting.

In his Complaint, McKay offers two arguments against application of the *Smith* standard in this case. First, he argues *Smith* applies only in those cases where the religious conduct is prohibited by law. Cases in this circuit, however, have applied *Smith* in situations involving affirmative conduct, required by the State but prohibited by an individual's religious beliefs. In *Kissinger*, the court used the Smith criteria to evaluate Ohio State University's requirement all students complete a course in "Operative Practice" in order to graduate from the College of Veterinary Medicine. *Kissinger*, 5 F.3d at 178-179. Like section 2-2-116, the curriculum addressed in *Kissinger* required an individual to engage in affirmative conduct in order to be entitled to a benefit from the state. In spite of this possible grounds for distinction, the Sixth Circuit still held *Smith* applicable. This Court is therefore compelled to apply the *Smith* criteria in this case.

McKay's second argument against application of *Smith*, is similarly unpersuasive. In *Smith*, the United States

Supreme Court implied the traditional strict scrutiny standard might still be applicable in those cases involving a hybrid of rights where a Free Exercise claim was coupled with a claim the contested state law or policy infringed another fundamental right. *Smith*, 494 U.S. at 881. McKay argues, under this rationale, strict scrutiny should be applied in this case because section 2-2-116 infringes his right to vote as well as his freedom of religion. The Sixth Circuit unequivocally rejected this reasoning in *Kissinger*. "[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in Smith to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Kissinger*, 5 F.3d at 180.

As discussed above in this section, *Tenn. Code Ann.* 2-2-116 does not unconstitutionally burden or infringe upon McKay's right to vote. Even assuming, for the sake of argument, that McKay's right to vote were somehow implicated along with his Free Exercise rights, a strict scrutiny analysis would still be rendered inappropriate by the Sixth Circuit's holding in *Kissinger*. When evaluating generally applicable, exceptionless state regulations under the Free Exercise Clause, the Court is required by Sixth Circuit precedent to apply the standard set forth in *Smith*. An application of this standard leads to the conclusion *Tenn. Code Ann.* § 2-2-116 does not unconstitutionally infringe McKay's First Amendment right to free exercise of religion.

IV. CONCLUSION

After reviewing all of the evidence in the light most favorable to Plaintiff, the court concludes, as a matter of law, McKay cannot prove his federal statutory or constitutional

claims at trial. Therefore, for the foregoing reasons, Defendants Motion for Summary Judgement should be **GRANTED.** An order shall enter.

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Entered 02/26/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendant

No. 1:98-CV-354
Collier / Powers

SCHEDULING ORDER

1. ***Introduction***: Pursuant to Fed. R. Civ. P. 16(b) a scheduling conference was held in this cause on **February 19, 1999**. Present representing the plaintiff were attorney **Jes Beard**. Present representing the defendant were attorney **Janet Kleinfelter and William Marett**. The following action was taken.

2. ***Jurisdiction***: In this case, the subject matter jurisdiction of the Court has been invoked pursuant to **28 U.S.C. § 1331** and is in dispute.

3. ***Consent To Magistrate Judge***: The parties **do not** consent that all proceedings in this case may be conducted by a United States Magistrate Judge in accordance with 28 U.S.C. § 636(c).

4. ***Settlement / Alternative Dispute Resolution***

(a) The possibility of settlement is **unlikely** at this time.

5. ***Disclosure and Discovery***:

(a) ***Fed. R. Civ. P. 26(f) Meeting***: The parties will hold a discovery planning meeting by telephone as required by Rule 26(f) on **March 18, 1999 at 11:00 a.m.** Mr. Marett will initiate the call.

(b) ***Discovery Plan***: At the Rule 26(f) meeting the parties shall develop a discovery plan and file it with the Court within ten (10) days after said meeting. This discovery plan shall conform to the provisions of Fed. R. Civ. P. 26(f).

(c) ***Expert Testimony***: Disclosure of any expert testimony in accordance with Fed. R. Civ. P. 26(a)(2) shall be made by all parties on or before **June 1, 1999**.

(d) ***All Discovery***: All discovery, including the taking of depositions "for evidence" shall be completed by **July 12, 1999**.

6. ***Other Scheduling Matters***:

(a) ***Dispositive Motions***: All dispositive motions under Fed. R. Civ. P. 12 and all motions for summary judgement pursuant to Fed. R. Civ. P. 56 shall be filed as soon as possible, but no later than August 31, 1999. The failure to timely file such motions will be grounds to summarily deny them.

SO ORDERED.

ENTER:

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX F

[Entered 11/24/98]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,
CAROLYN JACKSON, individually and as
Administrator of Elections,
Hamilton County, Tennessee,
CLAUDE RAMSEY, County Executive,
Hamilton County, Tennessee,

Defendants

No. 1:98-CV-354
Judge Curtis L. Collier

ORDER

Before the court is Plaintiff Martin S. McKay's Motion To Amend (Court File No. 10). McKay seeks to

amend his Complaint to include a request for injunctive relief under 42 U.S.C. § 1983. Rule 15(a) of the Federal Rules of Civil Procedure states, in pertinent part, "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." As yet, there has not been a response to McKay's Complaint. Accordingly, McKay's Motion To Amend is **GRANTED**. McKay is **ORDERED** to file an amended complaint within fifteen (15) days of the entry of this Order.

SO ORDERED.

ENTER:

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX G

Intervention By United States (28 U.S.C. § 2403)

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

* * * * *

Civil Rights Act of 1964 (42 U.S.C. § 1971)

(a)(2) No person acting under color of law shall –

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified to under State law to vote in such election; …

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege

secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order ...

* * * * *

Privacy Act of 1974, Section 7 (P.L. 93-579 § 7)

(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the [The] provisions of paragraph (1) of this subsection shall not apply with respect to --

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of a individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

* * * * *

National Voter Registration Act of 1993 – Simultaneous Application For Voter Registration And Driver License (42 U.S.C. § 1973gg-3)

(a)(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under state law ...

(c)(2)(B) may require only the minimum amount of information necessary to --

(i) prevent duplicate voter registrations; and
(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

* * * * *

National Voter Registration Act of 1993 – Contents Of Mail Voter Registration Form (42 U.S.C. § 1973gg-7)

(b)(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

* * * * *

Qualified Voter (TENN. CODE ANN. § 2-2-102)

A citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or under a judgement of infamy pursuant to § 40-20-112.

* * * * *

Registration Form (TENN. CODE ANN. § 2-2-116)

(c) The permanent registration record shall be substantially as follows, shall contain all the information required before being signed by the registrant, and shall be witnessed as indicated on the form.

Item 5. Social Security Number, if any

* * * * *

Permanent Registration Records Open To Inspection (TENN. CODE ANN. § 2-2-127)

Prior To Modification

Permanent registration records as public records shall be kept in a safe place by the commission, shall be available for public inspection, and may not be removed from the office of the commission except as required for the performance of duties under this title or in compliance with court orders.

Modification Effective April 12, 1999

(a) Permanent registration records as public records shall be kept in a safe place by the commission, shall be available for public inspection, and may not be removed from the office of the commission except as required for the

performance of duties under this title or in compliance with court orders; provided that a registrar shall make a reasonable effort to redact a person's social security number from a record before such record is made available to any person other than the holder of the number if such record is stored in a computer readable format on April 12, 1999. When such records are first stored in a computer readable format or when changes are made to any computer program that stores or accesses records, a registrar shall redact a person's social security number from a record before such record is made available to any person other than the holder of the number. The coordinator of elections shall also redact the social security number before making any voter registration records available to the public.

* * * * *

Voter Registration Lists – Purchase By Citizens
(TENN. CODE ANN. § 2-2-138)

(a) In counties of this state having a population in excess of one hundred eighty thousand according to the United States census of 1970 or any subsequent United States census, or in any computerized county, it is the duty of the commissioners of elections to prepare or cause to be prepared each month a listing, by voting precinct, of all persons registered to vote in each precinct during the preceding month.

(b) Such list, and any other voter registration information such as voter history, if compiled, shall be available for purchase for a price not to exceed the cost of production ...

APPENDIX H

Stipulation By Parties That Plaintiff Attempted To Register To Vote Using A Mail-In Application
Hearing For Preliminary Injunction (TR 69, lines 23-25; TR 70, lines 1-9)

THE COURT: Call your next witness.

MR. BEARD: Your Honor, it's my understanding that the agreement on – or along with the submission of Exhibit 30 is the understanding that, in fact, Mr. McKay did fill that out, received it, submitted it, returned it, and that that was the application which is headed up at the top "Mail-In Application." As long as all that is agreed to, then I don't have anything further, Your Honor.

MS. KLEINFELTER: We agree to it. We all agree to that, Your Honor.

THE COURT: Okay. Apparently there is a stipulation.

Parties At Preliminary Injunction Hearing

Mr. Beard	Counsel For Plaintiff
Ms. Kleinfelter	Counsel For State Defendants